

Hatungimana (Migration) [2019] AATA 2737 (3 April 2019)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
REVIEW APPLICANT:	Mr Modeste Hatungimana
VISA APPLICANTS:	Mr Eliphaz Ndayishimye Ms Anserme Harerimana Miss Egide Irakoze
CASE NUMBER:	1732722
DIBP REFERENCE(S):	OSF2016046574
MEMBER:	Kate Millar
DATE:	3 April 2019
PLACE OF DECISION:	Adelaide
DECISION:	The Tribunal remits the applications for Child (Migrant) (Class AH) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 117 (Orphan Relative) visas: • Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

Statement made on 03 April 2019 at 11:51am

3. **CATCHWORDS**

4. *MIGRATION – Child (Migrant) (Class AH) visa – Subclass 117 (Orphan Relative) – Bogus documents – death certificates for parents – some indication that certificates were fraudulent – new certificates issued – certificates of reconnaissance and death certificates genuine – compelling circumstances – financial and emotional impact on Australian citizen – decision under review remitted*

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6. **LEGISLATION**

Migration Act 1958 (Cth), s 5(1)

Migration Regulations 1994 (Cth), Schedule 2, cl 117.223, Public Interest Criterion 4020

CASES

Kaur v MIBP [2017] FCAFC 184

Plaintiff M64/2015 v MIBP [2015] HCA 50

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

7. Egidem Ndayishimye, Anserme Harerimana and Eliphaz Irakoze (the applicants) are citizens of Burundi. They applied for Child (Migrant) (Class AH) (Orphan Relative) visas on 6 January 2016 on the basis that their uncle Mr Hatungimana is an Australian citizen, and both of their parents are deceased.
8. A requirement for the grant of this visa is that there is no evidence before the Minister that an application has given a bogus document. In this case, the delegate found that the death certificates for the applicants' parents were bogus documents. The delegate further found there were not compassionate and compelling circumstances affecting Mr Hatungimana that justified the grant of the visa, and therefore decline to waive this requirement.
9. The applicants claimed there was an error in issuing the death certificates and provided new death certificates, however the delegate found he could not place weight on the re-issued death certificates.
10. Mr Hatungimana appeared before the Tribunal on 4 December 2018 to give evidence and present arguments. The Tribunal hearing was conducted with the assistance of an interpreter in the Kirundi and English languages.
11. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

CONSIDERATION OF CLAIMS AND EVIDENCE

12. The requirements for the grant of a Child (Migrant) (Class AH) (Orphan Relative) visa are set out in Part 117 of Schedule 2 of the Migration Regulations 1994 (the Regulations). These requirements include at cl.117.223 of Schedule 2 that applicants satisfy specified public interest criteria. This includes public interest criteria 4020 (PIC4020). In issue in this matter is whether the applicants meet PIC4020.
13. In this case, this requires a determination of whether the applicants have provided a bogus document; and, if so, whether there are compassionate and compelling circumstances that affect the interests of an Australian citizen, Australian permanent resident or eligible New Zealand citizen that justify the grant of the visa.

Have the applicants provided bogus documents?

14. As it applies in this case, PIC 020 requires that there no evidence that an applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document (PIC 4020(1)).
15. The requirement in PIC 4020(1) not to provide a bogus document applies whether or not the Minister became aware of the bogus document because of information given by the applicant: PIC 4020(3). It also applies whether or not the document was provided by the applicant knowingly or unwittingly.
16. A 'bogus document', as defined in s.5(1), is a document that the Tribunal reasonably suspects is a document that:
 - purports to have been, but was not, issued in respect of the person, or

- is counterfeit, or
 - has been altered by a person who does not have authority to do so, or
 - was obtained because of a false or misleading statement, whether or not made knowingly.
17. The Applicants provided death certificates for their parents in support of their claim. These certificates were issued by 'The Ministere De L'Interieur, Province Makamba, Commune Nyanza-LAC, Service De L'Etat-Civil.
 18. The delegate found these were bogus documents. This opinion was based on information from the International Organisation for Migration (IOM) Bujumbura that at the request of the Department an officer visited the issuing office in Burundi. The officer reported the documents were signed and stamped by an official agent, but was advised that while the certificate numbers appeared in the register, the details in the death certificates did not match the details on the documents. As a result an officer of the Department found the death certificates were bogus.
 19. This information was put to the applicants by the Department. In response they wrote that they also went to the issuing officer and were also told the numbers of the certificates appear in the records but do not match the details on the certificates. They report they were also told there was a mistake on the numbers on the certificates. They submit they are not fraudulent documents, but that the issuing office mistakenly put the wrong numbers on the documents.
 20. The test provided in PIC4020 (1) is that there is *no* evidence that an applicant has provided a bogus document. In this case there is *some* evidence, in the form of a site visit reporting that the certificate numbers do not match details in the records, that the death certificates were not issued in respect of the person, or that they are counterfeit or have been altered. The site visit, and in particular the information that the numbers on the certificates did not match details in the register, is logically probative of whether the death certificates are bogus and can be regarded as evidence.
 21. As there is some evidence that the applicants have provided bogus documents, they do not meet PIC4020(1).

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

22. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s.5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a

Should the requirements of PIC 4020(1) be waived?

23. The requirements of PIC 4020(1) and (2) may be waived where there are compelling circumstances that affect the interests of Australia, or where there are compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident, or an eligible New Zealand citizen (as defined in r.1.03), that justify the granting of the visa. The decision-maker must first be satisfied that there are such circumstances, then must consider whether to exercise the discretion to waive the requirements, having regard to those circumstances: *Kaur v MIBP* [2017] FCAFC 184.

24. This requires the examination of two separate elements. As it is not suggested that the interests of Australia would be affected by a decision, the first is whether there are compassionate or compelling circumstances affecting a relevant person. If there are compassionate or compelling circumstances the second issue is whether these justify the grant of the visa.
25. ***Are there compassionate or compelling circumstances?***
26. The expressions 'compelling circumstances' and 'compassionate or compelling circumstances' are not defined for these purposes. To be compelling, the circumstances must force or drive the decision-maker irresistibly to be satisfied: see Plaintiff M64/2015 v MIBP [2015] HCA 50. The ordinary meaning of 'compassionate' relates to feelings of sympathy, sorrow, pity or concern for others.
27. In this case, the Australian citizens whose interests are affected by the decision is Mr Hatungimana, and potentially his wife, children and step-child. He said he provides financial support to the visa applicants because they are children. He said every three months he sends approximately \$300AUD. This causes him hardship, as he has an income of approximately \$60,000 per annum and has a wife and six children in Australia, as well as one step-child. After the hearing he provided receipts for money transfers of between approximately \$1000 and \$300 approximately every two months to Zerubabert Ndikumana.
28. The visa applicants are currently living with Mr Hatungimana's uncle in Burundi in Nyanzalac province. He states their parents were killed and the applicants are not safe because of how their parents were killed, and while the applicants are in a different area to where they lived with their parents, they fear what will happen to them. He said the situation in Burundi is generally good, but it is hard for this family. He said that the death of the parents was less because they are Twa than because they claimed land which was taken by the people who killed them. The applicants cannot access the land or the property and this makes them fearful and makes it difficult to survive in Burundi as he says a person without land has a marginal existence. On being asked if the applicants would be at risk if they did not try to access the property, Mr Hatungimana said that to live in Burundi a person needs land otherwise it is hard to survive.
29. Mr Hatungimana said this has an adverse effect on him emotionally and he fears he may lose the applicants because of what happened to their parents. He does not see a doctor or counsellor but does access support through his church.
30. The emotional effect on Mr Hatungimana due to his fear for the safety of the applicants and the financial effect on him and his family in Australia amount to compassionate and compelling circumstances.
31. ***Do these justify the grant of the visas?***
32. In response to the opportunity to comment in the site visit that found the certificates were fraudulent, the applicants stated they had also contacted the issuing authority and discovered that there had been an error on their part. They provided new certificates claiming to have been issued by the same authority along with two certificates of reconnaissance stating the chief of the zone of Kazirabageni had announced the applicants' parents were deceased.
33. The Tribunal requested these documents to be verified by the Department. On 7 February 2019, an officer of the International Organisation for Migration went to the issuing office. The officer was advised the certificates of reconnaissance were genuine and the death

certificates were genuinely issued by the issuing office and the information in it matches the information on record.

34. While this is not conclusive of the facts in the documents, it does provide information in support of the grant of the visa.
35. Given the stated situation of the applicants where their parents are deceased and they are being supported by their uncle in circumstances that cause him financial hardship and he fears for their safety, the compassionate and compelling circumstances affecting the interests of Mr Hatungimana and his family justify the grant of the visa.
36. Therefore the requirements of PIC 4020(1) should be waived.

Has the applicant satisfied the identity requirements?

37. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. Identity documents have been provided by the applicants, as there is no other information before the Tribunal to show that these documents cannot be relied on.
38. Therefore, the applicants meet PIC 4020(2A).

Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

39. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
40. There is nothing before the Tribunal to show that a visa has previously been refused, and PIC 4020(2B) is met.

Conclusion

41. On the basis of the above, the applicants satisfy PIC 4020 for the purposes of cl.117.223.

DECISION

42. The Tribunal remits the applications for Child (Migrant) (Class AH) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 117 (Orphan Relative) visas:
 - Public Interest Criterion 4020 for the purposes of cl.117.223 of Schedule 2 to the Regulations.

Kate Millar
Senior Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s.5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

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